CHIN BAN KEAT v. REX.

[App. Crim. Juris. (Jobling, J.) December 1, 1949]

[Penang — Criminal Appeal No. 36 of 1949]

Criminal Procedure Code, ss. 182 and 299 — Procedure on plea of guilty — Sentence — Necessity of recording facts for assessment of sentence — Deliberate provoking of an offence by the Police — Penal Code, s. 161.

This was an appeal against the conviction of the appellant on a charge of accepting an illegal gratification, an offence under s. 161 of the Penal Code. At the trial the appellant pleaded guilty through his Counsel and, after a statement of facts had been given, the appellant was convicted.

Held, (1) that it is the duty of the Court to be satisfied that the accused understands the consequences of his plea and intends to admit the offence, and if the Court is satisfied on these points, it is immaterial whether the plea is made by the accused himself or by his Counsel on his behalf; (2) that after accepting a plea of guilty the Court should record facts to enable it to assess the sentence and as in this case the facts recorded were insufficient to show the circumstances in which the offence was committed therefore a retrial must be ordered.

Semble: The deliberate provoking of an offence by the Police merely because it is suspected that the person provoked has previously committed a similar offence cannot be too strongly condemned and the remarks of Lord Goddard, C.J., in **Brannan v. Peek**[3] should be brought to the notice of the Police authorities for such action as they may think necessary.

Cases referred to :—

(1) *The Municipal Commissioners v. Chuah* Seng & Ors. 3 Ky. 140.

(2) *Rex v. Tan Thian Chai & Anor.* (1932) M.L.J. 74.

(3) *Brannan v. Peek* (1947) A.E.R. 572.

MAGISTRATE'S APPEAL.

T. E. Conaghan for the Appellant.

W. C. Wylie (Federal Counsel) for the Respondent.

Jobling, J. : — The appellant was charged in the Magistrates' Court with three charges of accepting an illegal gratification, contrary to section 161 of the Penal Code and pleaded guilty to one charge and not guilty to the other two. He was convicted on his plea in respect of one charge and the other two were withdrawn. Appellant has now appealed against his conviction and sentence, and Mr. T. E. Conaghan has submitted that section 299 of the Criminal Procedure Code which provides that no appeal shall lie against a conviction after a plea of guilty, is no bar to the appeal in this case.

Mr. Conaghan bases his submission on two grounds; first, that the charge discloses no offence known to the law and secondly, that the appellant did not himself plead guilty, his Counsel having pleaded on his behalf.

On the first ground it was contended that neither the charge or the evidence before the Court disclosed the nature of the official act which it was alleged appellant did in consequence of the gratification.

The charge reads as follows :—

> You are charged that you being a public servant namely a detective in the Police Department, on or about the 18th day of June, 1949, at the Court compound, did accept from one Cheong Poh Chin a gratification namely $5/- other than legal remuneration, as a motive for showing favour to the said Cheong Poh Chin in the exercise of your official functions, and that you thereby committed an offence punishable under section 161 of the Penal Code.

And the statement of facts given to the Court was as follows :—

> Accused arrested Chong Poo Kit for failing to effect change of address. After bail accused collected money from him for rendering assistance to get him bailed out. Chong reported to Inspector Ritchie.

Appellant, who was represented by Counsel, made no comment on this statement.

It is clear that neither the charge nor the statement discloses the nature of the official act alleged to have been done by the appellant and the question is what effect this has on the plea of guilty to a contravention of section 161 of the Penal Code.

The Municipal Commissioners v. Chuah Seng and others[1] was cited by Mr. Conaghan in support of his submission, but it is not altogether on all fours, as in that case evidence was led which showed no offence has been committed. Here the facts stated are too meagre to say for certain whether or not the appellant did do any official act to favour the person from whom he accepted the gratification.

The charge follows the words of the section and is a valid charge and in my view mere uncertainty in the statement of facts does not invalidate the plea of guilty, although it does make it necessary for evidence to be taken to ascertain exactly what facts are alleged.

On the second ground Mr. Conaghan contends that the only acceptable plea is one made by an accused himself and that the plea by Counsel on his behalf cannot be entertained.

In *Rex v. Tan Thian Chai and another*[2], Whitley, J. agreed with the submission on behalf of appellants that an accused must plead guilty, or claim to be tried, by his own mouth and not through his Counsel, but that was a case where the accused appealed on the ground that their Counsel did not have authority from them to plead guilty.

No such ground of appeal has been put forward in this case, and Mr. Conaghan has not been instructed whether or not the accused authorised the plea of guilty on his behalf. I am asked to hold that an accused must always plead by his own mouth, but I can find nothing to support this contention. Section 182 of the Criminal Procedure Code does not specifically provide for the plea to be made by an accused. It merely lays down that the accused "shall be asked whether he is guilty of the offence charged or claim to be tried" and then goes on in sub-section (b) :—

> (b) If the accused pleads guilty to a charge whether as originally framed or as amended, the plea shall be recorded and he may be convicted thereon; provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the offence alleged against him.

I think the proviso to this sub-section shows that the essence of the provision is that the Court shall be satisfied that the accused understands the consequences of a plea of guilty and intends to admit the offence. If the Court is satisfied on these points I do not think it is precluded from accepting Counsel's plea of guilty on behalf of his client.

In my view the position is that if Counsel pleads for his client the plea may legally be accepted and the Court may assume that he is acting in accordance with instructions. But if there is any evidence or even the mere assertion by the accused that the plea was without his authority the Court would be justified in disregarding the Counsel's plea. If this is correct it is clear that the practice of accepting Counsel's plea on behalf of his client is highly undesirable and should be avoided. The only satisfactory way of ascertaining what is in accused's mind is to make him plead himself and record his words. That is the best practice and precludes all questions of whether the plea was authorised or not.

In this appeal the facts are that the accused made an unequivocable plea of guilty through his Counsel after the charge had been explained to him and there is no suggestion that this plea was not fully authorised by accused. I therefore accept the plea and hold that in accordance with section 299 of the Criminal Procedure Code no appeal lies against the conviction in this case.

An appeal does, however, lie on the question of sentence and as I have already stated I am of opinion that the facts are not set out fully enough to show the circumstances in which the offence was committed. It is, therefore, impossible to consider the adequacy of the sentence imposed and the case must go back to the lower Court to have the facts fully recorded.

When recording the facts the Magistrate will also have to record the accused's admission or denial of them and if the facts admitted do not constitute the offence charged the Magistrate will then have to consider whether to discharge the accused or enter a plea of not guilty and proceed to trial.

In the circumstances I think the only practical course is to deal with this matter on revision and order a retrial.

Mr. Conaghan has asked for directions whether after a plea of guilty evidence should be led as to the facts alleged or if they should be merely stated by the Prosecuting Officer.

This is a matter of practice which must be left to the presiding Magistrate. The aim of the Court is to record the facts alleged by the Prosecutor and admitted by the accused and to satisfy itself that they constitute the offence charged.

In most cases this can be satisfactorily achieved by a statement by the Prosecuting Officer followed by an admission by the accused but in cases of doubt or difficulty it may be advisable to have evidence led as to the facts. The course adopted in each case must be left to the Court's discretion.

There is one further matter in this case that must be mentioned. Mr. Conaghan alleged, and the record appears to confirm, that the Police provoked this offence by sending one of their men to offer an illegal gratification to the accused.

Police action of this kind has been commented on recently by Lord Goddard, C.J., in *Brannan v. Peek*[3] as follows :—

> There is another point of much greater public importance. The Court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct and I do not think any Act of Parliament does so provide — it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so he had committed an offence. I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be

convicted and punished, for the order of their superior would afford no defence.

The deliberate provoking of an offence merely because it is suspected that the person provoked has previously committed a similar offence cannot be too strongly condemned and Lord Goddard's comments should be brought to the notice of the Police authorities for such action as they may think necessary.

For the reasons set out above I treat this matter as an application for revision and set aside the conviction and sentence and order the accused to be retried.

Re-trial Ordered.

ESTATE OF LEE CHOON GUAN (Deceased); TAN TECK NEO v. GEORGE TAN AND OTHERS.

[Privy Council (Lord Simonds, Lord Radcliffe and Sir Malcolm Macnaghten) October 12, 1949]

[Privy Council Appeal No. 79 of 1947]

Will — Direction to pay annuities out of residuary trust income — Whether annuities cease at period of division of the capital of residuary trust fund.

In this case the testator by his Will provided for the payment of annuities to the appellant, the widow of the testator and his four concubines. The Will further provided that the payments of the annuities were to be apportioned equally between two residuary funds referred to in the Will. The residuary estate of the testator fell to be finally divided among the grandchildren and the remoter descendants of the testator at the expiration of 21 years from his death namely on the 27th of August, 1945. At that date all the annuitants were still living. The question was then raised as to whether the annuities ceased at the period of final distribution of the residuary fund. The learned Chief Justice and the Court of Appeal held that the rights of the annuitants came to an end as they were charged upon the income of residuary trust funds, which had to be finally distributed and could therefore produce no further income.

Held, (1) that the provision in the Will for the payment of the annuities out of the two funds was a mere administrative provision to ensure that the trustees who keep the accounts of the estate are to charge these payments in equal amounts upon the two funds of residuary income created by the Will and had no other purpose; and (2) that therefore the annuities continue to be payable during the lives of the respective annuitants.

The judgment of the Board was delivered by :—

Lord Radcliffe : — The purpose of this appeal is to establish the rights of two classes of beneficiaries under the will and codicil of a Chinaman, Lee Choon Guan, who died at Singapore on 27th August 1924. One class consists of the appellant herself, the widow of the testator and the defendant Lee Chim Tuan, a trustee of the will and Codicil; the other is formed by four women whose names are given in Clause four of the codicil and to whom the testator directed his trustees to make certain monthly payments during their respective lives. All these beneficiaries may conveniently be referred to as "the annuitants".

By virtue of certain dispositions contained in the will and codicil which will be referred to in detail hereafter the testator's residuary estate fell to be finally divided among his grandchildren and remoter descendants at the expiration of 21 years from his death, namely, on 27th August, 1945. At that date all the annuitants were still living. The construction of the Will and Codicil which has found favour with the learned Chief Justice in the High Court of the Colony of Singapore and on appeal with the learned Judges of the Court of Appeal of that Colony is to the effect that on that date the rights of each of the annuitants came to an end, and that as a consequence this event of the division of residue into capital shares left the testator's widow and the four other ladies, who were in fact his concubines, without any further right to look to his estate for the payment of the monthly sums which they had hitherto been receiving.

This construction does not commend itself to their Lordships as correct. It appears to them to involve a confusion between administrative provisions regulating how these annuities, when paid, were to be charged against the residuary estate, in which there were numerous and settled interests, and substantive provisions specifying the source of the annuities themselves. And it also appears to them to give inadequate weight to the fact that the annuities are expressly given for the respective lives of the annuitants. But it is impossible to discuss what is at issue in this question of construction and to explain why their Lordships feel constrained to differ from the views taken in the Courts below without briefly setting out the scope and contents of this Will and Codicil so far as they are material.

The will was made on 11th March, 1913. It began with an appointment of executors and trustees and the gift of a number of pecuniary legacies to vest immediately on the testator's death. Clause 6 (which the codicil revoked) directed the trustees to purchase an annuity of 480 dollars a year for his concubine Ah Lee (one of the four later mentioned in the Codicil) during her life. Then there followed (a) further immediate legacies, (b) a settlement of the testator's house and furniture on his widow for life with remainders over, and (c) a direction to his trustees to pay the funeral expenses of himself (up to 10,000 dollars) and of his widow (up to 5,000 dollars). It is true, as the appellant points out, that the time for the payment